



U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

Honorable Frank R. Wolf
House of Representatives
Washington, D.C. 20515

Dear Congressman Wolf:

On June 21, 1984, Mr. Lowell Smith, Congressional Fellow, of your office advised that you requested the FBI's views regarding legislation that would curtail the use of the polygraph as an investigative tool and would place limitations on the use of prepublication review agreements. Because several bills have been introduced, each purporting to be restrictive to varying degrees, I have chosen H.R.4681 as the focal point of my remarks.

Present FBI policy regarding the use of the polygraph encompasses many different factual situations that do not involve allegations of criminal conduct or unauthorized disclosure of classified information. Examples of such situations include the use of the polygraph as a factor in resolving questions concerning an applicant's suitability for employment with the FBI, as well as a factor in resolving issues that concern employee misconduct or fitness for duty. H.R.4681, as presently drafted, would prohibit these uses of the polygraph, thereby severely jeopardizing the Bureau's ability to assure the trustworthiness, reliability, and effectiveness of its employees.

We recognize that the polygraph can be abused if used indiscriminately, and if sanctions are imposed based solely on polygraph results or the refusal to submit to a polygraph examination. At the FBI, the decision to request an employee to submit to a polygraph examination is made on a case-by-case basis. Additionally, it is not our policy to require or coerce an employee to submit to a polygraph examination, although, in certain limited situations, an adverse inference may be drawn from an employee's refusal to submit to a polygraph examination.

Honorable Frank R. Wolf

The FBI and other members of the Intelligence Community have national security responsibilities which are, to a great extent, indistinguishable from those of the CIA and National Security Agency (NSA), both of which are exempted under Section 6 of the bill. Information originating with any of the members of the Community is frequently shared with one or more of the other members; therefore, the penetration of any such agency by a foreign intelligence service or the unauthorized disclosure by an employee has as great a potential for damage to the national security or foreign policy of the United States as the loss of information in possession of NSA or the CIA. The bill creates an untenable disparity in the safeguards employed by agencies possessing the same information. This disparity would have the potential of causing those agencies being able to employ the polygraph as a security safeguard to reconsider the dissemination of sensitive information to those members of the Community not employing it in a similar manner. Any restriction of the information flow, whether formal or informal, resulting from a perception of a disparity in security safeguards among members of the Intelligence Community, would be extremely detrimental to the FBI and other members of the Intelligence Community.

The direct impact of the bill on the FBI can be illustrated by several examples. In the preemployment area when a decision has to be reached to hire someone who will have access to sensitive material, the FBI is frequently confronted with applicant background information which is not verifiable through normal investigation because this information is sometimes only available in other countries. Although individuals with certain ethnic backgrounds are especially valuable to us, such a lack of verification could prevent their being hired. In addition, although someone with a highly desirable ethnic background may have spent his/her entire life in the United States, hostage situations may exist where family members or friends remain in hostile countries. The only way to discover such a situation or its effect on the applicant or employee may be through use of the polygraph. In situations involving information or allegations pertaining to on-duty employees, the problem is even more serious. The limitation of damage done to the national security would be dependent

Honorable Frank R. Wolf

upon the speed of discovery. The bill in Section 3(b) implies that an investigation must have focused upon the particular employee and then only when classified material, as defined by the executive order, or criminal conduct is involved. The initial stages of contact with an intelligence officer frequently involve information which, while not classified and not criminal in its passage would be of extreme importance to a hostile service and would quickly lead to the passage of more sensitive information if not acted on promptly. The bill would greatly hinder the FBI's efforts in such a situation where prompt but judicious use of the polygraph would result in a quick resolution and limitation of national security damage.

The Bureau's use of the polygraph is a responsible and measured response to investigative requirements. During Fiscal Year 1983, the polygraph was used in only 166 situations which would have been proscribed by the bill. Of those, 40 involved personnel matters, 116 applicant matters, and 10 security clearance matters. While the number of examinations was small, the benefit derived was extremely great.

The proposed legislation's prohibition on the use of prepublication review requirements would dramatically affect the FBI's policy in this area. At present, the FBI uses a standard employee agreement contract, FD-291, wherein a prospective employee, as a condition of employment, agrees to submit for prepublication approval the content of any proposed disclosure which includes any information acquired as a result of, or during the course of, his/her official duties/position. The proposed legislation would totally prohibit the continued use of such an agreement. The effect would be to end pre-screening of any communication, written or oral, by present or past employees regarding information obtained through their official duties or position.

It should be noted that in the intelligence and criminal investigative fields the damage is done upon the release/disclosure of sensitive information. Even though other statutes or regulations exist which provide for criminal and civil penalties for the unauthorized disclosure of such information, these penalties do not prevent the potential loss and damage to the Nation's national security and its law enforcement efforts.

Honorable Frank R. Wolf

We believe that the proposed legislation is overly broad and restrictive. Its total prohibition is inconsistent with past judicial decisions in the area of prepublication review (e.g., Snepp v. United States, 444 U.S. 507 (1980)).

For all these reasons, we believe that the FBI should be exempted from this proposed legislation, along with NSA and CIA. Failure to exempt the FBI would have a chilling effect on the cooperation between the FBI and other members of the Intelligence Community and would substantially impede the FBI in its fulfillment of its mission.

I hope you find the above information useful in connection with your consideration of bills addressing the use of the polygraph and prepublication review. If I may be of any further assistance, please do not hesitate to contact me.

Sincerely yours,

William H. Webster
Director